Parasuraman a/l Velu v Ketua Polis Negara, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–2 OF 2006
LIM YEE LAN JC
22 JUNE 2006

Administrative Law — Remedies — Habeas corpus — Application — Procedural non-compliances — Whether notice of hearing served on applicant — Whether applicant given right to be represented by counsel — Whether applicant's mother was not allowed to appear as his witness at representation proceeding — Public Order and Prevention of Crime (Procedure) Rules 1972

The applicant applied for a writ of habeas corpus on the grounds of procedural non-compliances of the provisions of the Ordinance and Public Order and Prevention of Crime (Procedure) Rules 1972 ('the Rules') by the Advisory Board. The grounds of non-compliances were: (1) Form II (Notice of hearing of representation) was not served on the applicant; (2) the applicant was not given the right to be represented by a counsel as guaranteed under art 151 of the Federal Constitution and rr 3 and 5 of the Rules; and (3) the applicant's mother although present during the representation proceeding was not allowed to appear as a witness on his behalf.

Held, allowing the application:

(1) While Form I contained the signature and thumb print of the applicant, Form II merely contained his signature which was substantially different from his signature in Form I and there was no thumb print of the applicant. This gave rise to a doubt whether Form II was ever served on the applicant and whether he knew of the contents of the said Form including the part that indicated that he did not intended to be represented by counsel (see para 2).

(2) It was clear from the affidavit of the Secretary to the Advisory Board that the applicant had indicated that he wished to be represented by a legal counsel during the proceeding before the Board. The right given to a detainee to be represented by a legal counsel is a real and substantive right guaranteed under the Constitution, Ordinance and the Rules made under the Ordinance and must be strictly adhered to. The Advisory Board in hearing any representation should not be seen to have just gone through the process in a mechanical or perfunctory manner (see para 3).

(3) The allegation of the applicant that his mother was not allowed to appear as a witness on his behalf was not replied to at all by the Secretary to the Advisory Board. The court was left in the dark on this issue as to whether the Board had

considered the mother's application but had exercised its discretion not to call her as a witness or it had not considered the matter at all in its proceeding (see para 4).

[Bahasa Malaysia summary

Pemohon memohon untuk satu writ habeas corpus atas alasan ketidakpatuhan prosedur peruntukan Ordinan dan Kaedah-Kaedah Ketenteraman Awam dan Pencegahan Jenayah 1972 ('Kaedah tersebut') oleh Lembaga Penasihat. Alasan-alasan ketidakpatuhan adalah: (1) Borang II (Notis mendengar representasi) tidak disampaikan ke atas pemohon; (2) pemohon tidak diberikan hak untuk diwakili oleh seorang peguam seperti yang dijamin di bawah perkara 151 Perlembagaan Persekutuan dan kk 3 dan 5 Kaedah tersebut; dan (3) ibu pemohon meskipun hadir semasa prosiding representasi tidak dibenarkan hadir sebagai saksi bagi pihaknya.

Diputuskan, membenarkan permohonan tersebut:

(1) Jika Borang I mengandungi tandatangan dan cap jari pemohon, Borang II hanya mengandungi tandatangannya yang amat berbeza dengan tandatangannya dalam Borang I dan tiada cap jari pemohon. Ini menimbulkan keraguan sama ada Borang II pernah disampaikan ke atas pemohon dan sama ada beliau mengetahui tentang kandungan Borang tersebut termasuklah bahagian yang menyebutkan bahawa beliau tidak berhasrat untuk diwakili oleh peguam (lihat perenggan 2).

(2) Adalah jelas daripada afidavit Setiausaha kepada Lembaga Penasihat bahawa pemohon telah menyatakan bahawa beliau ingin diwakili oleh seorang peguam semasa prosiding di hadapan Lembaga tersebut. Hak yang diberikan kepada seorang yang ditahan untuk diwakili oleh peguam merupakan hak yang nyata dan substantif dijamin di bawah Perlembagaan, Ordinan dan Kaedah tersebut yang digubal di bawah Ordinan itu dan hendaklah dipatuhi. Lembaga Penasihat semasa mendengar apa-apa representasi tidak sepatutnya bukan hanya dilihat sebagai melalui proses itu secara mekanikal atau mengikut fungsi (lihat perenggan 3).

(3) Pengataan pemohon bahawa ibunya tidak dibenarkan hadir sebagai saksi bagi pihaknya tidak dijawab langsung oleh Setiausaha kepada Lembaga Penasihat. Mahkamah tertanya-tanya berhubung iau ini sama ada Lembaga telah menimbangkan permohonan ibu itu tetapi telah menggunakan budi bicaranya untuk tidak memanggil ibu itu sebagai saksi atau ia tidak menimbangkan perkara itu langsung dalam prosidingnya (lihat perenggan 4).]

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 580–634.

Legislation referred to

Federal Constitution art 151
Public Order and Prevention of Crime (Procedure) Rules 1972 rr 3, 5

M Manoharan (M Manoharan) for the applicants.
Najib bin Zakaria (Attorney General's Chambers) for the respondents.

Lim Yee Lan JC:

[1] After hearing the submission on behalf of both parties and considering their respective affidavits, I find that in this case there were three procedural non-compliance by the Advisory Board of the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') and the Public Order and Prevention of Crime (Procedure) Rules 1972 ('the Rules').

[2] The first non-compliance is that there was no evidence whatsoever from the respondents in any of their affidavits to show that Form II (Notice of hearing of representation) was indeed served on the applicant and if so by whom and or whether it was explained and translated to the applicant in the language that he understood, ie Tamil. This is fortified by the fact that while Form I contained the signature and thumb print of the applicant, Form II merely contained his signature which is substantially different from his signature in Form I and there was no thumb print of the applicant. This gives rise to a doubt whether Form II was ever served on the applicant and whether he knew of the contents of the said Form including the part that indicated that he did not intended to be represented by counsel.

[3] The second procedural non-compliance is that the applicant was not given the right to be represented by a counsel as guaranteed under art 151 of the Federal Constitution and rr 3 and 5 of the Rules. It is clear from the affidavit of the Secretary to the Advisory Board in enclosure (4) in which Form I was exhibited as SR-1 that the applicant had indicated in the said Form that he wished to be represented by a legal counsel during the proceeding before the Board. The right given to a detainee to be represented by a legal counsel is a real and substantive right guaranteed under the Constitution, Ordinance and the Rules made under the Ordinance and must be strictly adhered to. The Advisory Board in hearing any representation should not be seen to have just gone through the process in a mechanical or perfunctory manner.

[4] The third procedural non-compliance was that the allegation of the applicant that his mother although present during the representation proceeding was not allowed to appear as a witness on behalf of the applicant as alleged in para 10(12) of his affidavit in support of his application was not replied to at all by the Secretary to the Advisory Board as it is clear from para 9 of her affidavit in enclosure (4) that she had merely replied to the first averment in para 10(12) of the applicant's affidavit in support but not to this averment in the said paragraph. One is left in the dark on this issue as to whether the Board had considered the mother's application but had exercised its discretion not to call her as a witness or it had not considered the matter at all in its proceeding.

[5] These above procedural non-compliances by the Advisory Board have raised doubts whether the applicant in this case had been given a full and meaningful

representation before the Board. Based on these reasons, I hereby allow the application of the applicant for a writ of habeas corpus and order that he be released forthwith.

Application allowed.

Reported by Loo Lai Mee